

When a sale is conducted in which the seller is obligated, under the terms of an agreement with the purchaser, to make delivery of the property from a point in this State to a point outside this State, not to be returned to this State, provided that such delivery is actually made, the gross receipts are not subject to tax. See 86 Ill. Adm. Code 130.605. (This is a GIL).

December 30, 1999

Dear Xxxxx:

This letter is in response to your letter received November 23, 1999. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120(b) and (c), enclosed.

In your letter, you have stated and made inquiry as follows:

This letter is to request your department's assistance in regards to a question that has arisen concerning the payment of sales tax.

COMPANY is a retailer of new and used video games and accessories. We have been in existence for more than 10 years and currently operate several stores in your state. Our sales generally range from \$50 to \$250 per customer per transaction.

As part of our expansion onto the internet COMPANY has recently begun contracting to sell our product with a large national and international internet seller. As part of the agreement the internet seller advertises and sells COMPANY's products on the internet seller's web site. The internet seller collects the money from the customer and gives COMPANY the information about the sale. COMPANY then ships the product to the customer. As part of our agreement the internet seller keeps a percentage of the gross sales.

Because the internet seller doesn't have a physical presence in your state they do not collect or remit any sales tax on the transaction.

COMPANY does however have nexus with your state.

Is COMPANY allowed an exemption for these internet sales through a third party? If so what documentation of the transaction is required of COMPANY? Specifically is COMPANY required to keep a log of all customers (name and address) who purchase products through this third party?

If someone in your office can answer these questions you can fax, mail, or e-mail your response directly to me. If not please forward to an office that can assist us.

Thank you for your help in this matter.

It is difficult to answer your questions because of the lack of specific information regarding the transactions, agreements and parties you describe. However, we can provide general information for your use.

The Illinois Retailers' Occupation Tax Act imposes a tax upon persons engaged in this State in the business of selling tangible personal property to purchasers for use or consumption. The tax is measured by the seller's gross receipts from such sales made in the course of such business. See the enclosed copy of 86 Ill. Adm. Code 130.101. In Illinois, Use Tax is imposed on the privilege of using, in this State, any kind of tangible personal property that is purchased anywhere at retail from a retailer. See the enclosed copy of 86 Ill. Adm. Code 150.101. If the purchases occur in Illinois, the purchasers must pay the Use Tax to the retailer at the time of purchase.

When tangible personal property is located in this State at the time of its sale (or is subsequently produced in this State) and then is delivered in this State to the purchaser, the gross receipts from the sale are subject to Retailers' Occupation Tax and Use Tax if the sale is at retail. However, when a sale is conducted in which the seller is obligated, under the terms of an agreement with the purchaser, to make delivery of the property from a point in this State to a point outside this State, not to be returned to this State, provided that such delivery is actually made, the gross receipts are not subject to tax. See subsection (b) of the enclosed copy of 86 Ill. Adm. Code 130.605. Please note that a sale is taxable even though a purchaser that receives physical possession of the property in this State, transports or sends the property out of this State for use outside the State or for use in the conduct of interstate commerce. See 86 Ill. Adm. Code 130.605(a)(2).

There is no exemption in Illinois for sales made over the Internet. If you make sales which are filled from your inventory in Illinois, you are required to remit Retailers' Occupation Tax unless you can document an exemption. As stated above, the interstate commerce exemption may be available for sales where you are obligated, under the terms of an agreement with the purchaser, to make delivery of the property from a point in this State to a point outside this State, not to be returned to this State, provided that such delivery is actually made.

In the context of a General Information Letter, the Department is unable to make nexus determinations because the amount of information required to make that determination is often best gathered by an auditor. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether you are responsible to pay tax in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the

State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in 86 Ill. Adm. Code 150.201(i), enclosed. This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801, enclosed. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to Brown's Furniture, Inc. v. Zehnder, (1996), 171 Ill.2d 410.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The Use Tax rate is 6.25%.

Retailers making sales over the Internet who also have retail stores located in Illinois are required to collect the Illinois Use Tax on their Illinois deliveries. It is possible, see discussion above, that such retailers would incur Retailers' Occupation Tax (absent a valid exemption) on their sales made over the Internet if they fill orders from their Illinois inventories.

I hope this information is helpful. The Department of Revenue maintains a Web site, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

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If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of the enclosed copy of Section 1200.110(b).

Very truly yours,

Melanie A. Jarvis
Associate Counsel

MAJ:msk
Enc.